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Chronological List of Relevant Docket Entries.

JAMES ROYSTER, et-ano vs. PAUL D. MCGINNIS, Commissioner of Correction, et al.

DATE 70 CIVIL 4365	PROCEEDINGS 70 CIVIL 4365
Oct 8-70	Filed Complaint. Issued Summons.
Oct 8-70	Filed Motion to proceed in FORMA PAUPERIS
Oct. 13-70	Filed summons with marshal's ret. Served all 3 defendants through Attorney General on 10/8/70.
Oct. 27-70	Filed Notice of Motion re: 3-Judge Court. Ret. 11/10/70 and affidavit of service by mail.
Nov. 10-70	Filed Memorandum of Law. (filed in court).
Nov. 10-70	Filed (in court) Memorandum of Law for Defendants.
Jan. 21-71	Filed OPINION #37348. Plaintiffs' application for the convening of a 3-judge court is granted. It is so ordered. Lasker, J. (mailed notice).
Jan. 25-71	Filed ORDER designation judges in addition to the Honorable Morris E. Lasker to hear and determine this cause as provided by law: Hon. Paul R. Hays, U.S.C.J., Hon. Charles M. Metzner, U.S.D.J. Friendly, Acting Chief Judge. U.S.C.A. 2nd Cir.
Feb. 1-71	Filed Order that a hearing in this matter shall be held on Wednesday, 3-3-71, at 4:00 p.m. in Courtroom 110, Ordered that the parties shall submit memoranda and such other papers as they elect on or before Wednesday, 2-17-71, and that the originals of all papers submitted shall be filed with the Clerk of this Court and copies thereof delivered to each member of the three judge court at his chambers. Lasker, J.—mailed notices.

Chronological List of Relevant Docket Entries.

DATE	PROCEEDINGS
70 CIVIL 4365	70 CIVIL 4365
Feb. 3, 71	Filed Statutory Notice with return receipts.
Feb. 17-71	Filed Memorandum of Law for Defendants.
Feb. 23-71	Filed Opinion #37863: The New York correction law, insofar as it denies, good time credit for jail time to indeterminate sentence prisoners, in the computation of their minimum release dates, is hereby, declared unconstitutional, & deft's will be permanently enjoined, & restrained from enforcing it so as to deny such credit to pltff's & members of their class. The class is defined to include all, prisoners who are presently serving indeterminate sentences in state prison for offenses committed prior to Sept 1, 1967, who served, time in county jail prior to trial & sentence to state prison, who, have not yet reached their minimum release date, and who have not as yet elected the conditional release program under 230-a of the correction law. Submit decree on notice. Metzner, J. Lasker, J. & Hays, Circuit Judge, dissenting.
Oct 14 71	Filed ORDER that Sec 230 (3) of the NY Correction Law, insofar as it denies good time credit for jail time to indeterminate sentence prisoners in the computation of their minimum release dates, is hereby declared unconstitutional, and further ordered that Defts Paul D McGinnis, Harry Fritz and J. L. Casscles as Wardens are permanently enjoined and restrained as indicated. Ordered that the declaration of a class action is hereby granted, the class defined to include all prisoners who are presently serving indeterminate sentences in state prison for offenses committed prior to 9-1-67 who served time in county

Chronological List of Relevant Docket Entries.

DATE	PROCEEDINGS
70 CIVIL 4365	70 CIVIL 4365
	jail prior to trial and sentence to state prison, who have not yet reached their minimum release date, and who have not as yet elected the conditional release program under Sec 230-a of the Correction Law & further ordered that the mandate of this Court be stayed pending the disposition of defts' appeal to the U. S. Supreme Court provided that said relief be sought within 30 days of the order granting the stay or within such time as may be granted by the Supreme Court upon application to that Court for a further stay. Metzner J. Lasker, J. MEMO ENDORSED on this Order —"Although I dissent from this decision of the Court in this case, I join in the order as correctly representing that decision. Paul R Hays, U.S.C.J. Judgment entered—Clerk. (mailed notices)
Oct 27 71	Filed Affdvt. of G. Jeffrey Sorge, atty for pltffs, in opposition to portion of deft's proposed order requesting a stay in the mandate of this Court.
Nov 15-71	Filed ORDER that the mandate of this Court is stayed pending disposition of defts appeal to US Supreme Court provided that said relief be sought by 11-26-71 or within such times as may be granted by Supreme Court upon application to that Court for a further stay—Hays, C.J., Metzner, D.J., Lasker, D.J.
Nov 12 71	Filed Deft's Notice of Appeal $5.00 from the final order entered 10-14-71, to the Supreme Court of the U.S. Mailed copy
Apr 5 72	Filed ORDER that the record of the case on file in the U.S.D.C. is hereby certified and transmitted, in the original, to the Clerk of the U.S. Supreme Court. Lasker, j. m/n

Summons.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT—NEW YORK.

JAMES ROYSTER, PERCY RUTHERFORD, and all other perso similarly situated,

Plaintiff

against

PAUL D. McGINNIS, Commissioner of Correction, State New York, HARRY FRITZ, Warden, Auburn Pris Auburn, N. Y., J. L. CASSCLES, Warden, Ossining Co rectional Facility, Ossining, N. Y.,

Defendant

TO THE HON. LOUIS LEFKOWITZ, Attorney-General for th State of New York, counsel for the above-named defend ants:

You are hereby summoned and required to serve upo James J. McDonough, plaintiffs' attorney, whose addres is 262 Old Country Road, Mineola, N. Y., an answer to th complaint which is herewith served upon you, within twenty (20) days after service of this summons upo you exclusive of the day of service. If you fail to do s judgment by default will be taken against you for th relief demanded in the complaint.

JOHN LIVINGSTON
Clerk of Court
Deputy Clerk

Dated:

This Summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES ROYSTER, PERCY RUTHERFORD, and all other persons similarly situated,

Plaintiffs,

against

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, N. Y., J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, N. Y.,

Defendants.

The plaintiffs, by JOEL ZIEGLER, Esq., an attorney associated with James J. McDonough, Attorney in Chief, Legal Aid Society of Nassau County, New York, complaining of the defendants, respectfully alleges:

1. The jurisdiction of this court is invoked pursuant to the provisions of Title 28, United States Code, Section 1343.(2), this being a suit in equity which is authorized by law, Title 42, United States Code, Section 1983, to be brought to redress the deprivation under color of state law, statute, ordinance, regulation, custom, or usage of rights, privileges, and immunities secured by the Constitution of laws of the United States or by any Act of Congress providing for equal rights of citizens. The rights here sought to be redressed are rights guaranteed by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and Title 42, United States Code, Section 1983, as hereinafter more fully appears. The convocation of a three-judge District Court pursuant to 28 U.S.C. §§ 2281, 2284 is

sought to consider the allegations of unconstitutionality and enjoin enforcement of the state statute in question.

2. This is a class action brought by plaintiffs, on behalf of themselves and others similarly situated, for the purpose of having declared unconstitutional, and to enjoin enforcement of Section 230 (3) of the New York Correction Law which has the effect of requiring persons sentenced to state prisons for like terms of imprisonment to serve different terms of institutional incarceration depending on whether they happen to have been incarcerated in county jails pending receipt in state prison. The class on behalf of whom this action is brought is so numerous that joinder of all members is impractical; there are questions of law or fact common to the class which predominate over any questions affecting only individual members; the claims of the plaintiffs are typical of the class; the plaintiffs will fairly and adequately protect the interests of the class; and defendants have acted on grounds generally applicable to the class, thereby making appropriate final relief with respect to the class as a whole.

3. Plaintiffs, James Royster and Percy Rutherford, are citizens of the United States and inmates of Auburn Prison, Auburn, New York and Ossining Correctional Facility, Ossining, New York, respectively. Each of the plaintiffs and other members of the class on whose behalf this action is brought, has served a term of incarceration in a county jail prior to their conviction for various crimes, to wit:

Plaintiff Royster served 404 days in the Nassau County Jail prior to being sentenced to two consecutive five to ten year terms for Burglary in the third degree and Grand Larceny in the first degree.

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laintiff Rutherford served 242 days in the Nassau nty Jail prior to being sentenced to concurrent terms en to twenty years for Robbery in the first degree, two one-half to five years for Grand Larceny in the second ree, and a suspended sentence for Assault in the third ree (2 counts).

Defendant Paul D. McGinnis is the New York State mmissioner of Correction and defendants Harry Fritz J. L. Casscles are wardens of Auburn Prison, Auburn, York and Ossining Correctional Facility, Ossining, York, respectively.

Section 230(3) of the New York Correction Law di- s the population of the state correctional institutions several categories and permits or denies them the t to earn good time credit against their sentences. With ect to plaintiffs, who have received indeterminate sen- es, they may earn good time credit against the mini- n term of detention, but the statute specifically pro- bes the granting of such good time credit to prisoners tate prisons for "jail time" by stating that such credit l be allowed against the sentence imposed by the court s jail time allowance."

The classifications made by the statute and the dis- tions engendered are unconstitutionally arbitrary and icious and violate the provisions of Section 1 of the rteenth Amendment to the Constitution of the United es in the following respects:

a) This statute places the poor and disadvantaged, who unable to post bail prior to their conviction, on an qual footing with those persons who serve no term of onviction incarceration, by virtue of their ability to a bail bond.

(b) Assuming two persons, one indigent and the other rich, are charged with identical crimes and receive identical sentences, the indigent prisoner who spends his preconviction time in a county jail serves a total period of incarceration which is longer than that which is served by the prisoner who could afford to obtain bail while awaiting sentencing. Indigent prisoners thus receive increased punishment as a result of their poverty. Plaintiff Royster, because of his indigence and inability to make bail upon arraignment, is required to serve over four additional months in both county jail and state prison before becoming eligible to appear before the state board of parole for the first time, with the possibility of then securing release from prison. Plaintiff Rutherford must serve nearly three additional months.

(c) The statutory scheme serves to needlessly encourage guilty pleas for crimes where the penalty is relatively short, thereby allowing a prisoner to avail himself of the good time provision and be released from prison earlier, in many cases, than if he had gone to trial and been acquitted.

7. Plaintiffs allege that they have no plain, speedy, or adequate remedy at law; and that plaintiffs are suffering great and irreparable damage, for the aforesaid reasons alleged.

WHEREFORE, plaintiffs pray:

A. That the court decree that Section 230(3) of the New York Correctional Law is unconstitutional and void in its application to said plaintiffs in that it denies them equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Article 1, section 11 of the Constitution of the State of New York.

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3. That a permanent injunction be issued by said court
er trial of this action upon the merits before said court
petually enjoining and restraining the defendants from
orcing against plaintiffs the provisions of said statute.

4. For such other and further relief as this court may
m just.

Respectfully submitted,

JAMES J. McDONOUGH
Attorney for Plaintiffs
Attorney in Chief
Legal Aid Society of Nassau
County, N. Y.
Criminal Division
County Court House,
Mineola, New York

Counsel:

MATTHEW MURASKIN
JOEL ZIEGLER

CLOSE IN CENTER

Motion to Proceed in Forma Pauperis

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. .....

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JAMES ROYSTER, PERCY RUTHERFORD, and all other persons similarly situated,

Plaintiffs,

against

PAUL D. MCGINNIS, Commissioner of Correction, State of New York,

HARRY FRITZ, Warden, Auburn Prison, Auburn, N. Y.,

J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, N. Y.,

Defendants.

Plaintiffs, James Royster and Percy Rutherford move this court pursuant to 28 U.S.C. Section 1915 for permission to proceed in forma pauperis in filing the attached complaint. Affidavits in support of this motion are attached hereto.

JAMES J. MCDONOUGH
Attorney for Plaintiffs
Attorney in Chief
Legal Aid Society of Nassau County, N. Y.
Criminal Division
County Court House,
Mineola, New York

Of Counsel:
MATTHEW MURASKIN
JOEL ZIEGLER

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ffidavit of Percy Rutherford, in Support of Motion to Proceed in Forma Pauperis.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PERCY RUTHERFORD, and all other persons similarly situated,

Plaintiffs,

against

J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, N. Y.

I, PERCY RUTHERFORD, being duly sworn, according to w, state in support of my attached Motion to Proceed in orma Pauperis.

(1) I am the Plaintiff in the above-entitled case.

(2) I am, because of my poverty, unable to pay the costs of this case.

(3) I am unable to give security for it.

(4) I believe in good faith that I am entitled to the relief I am seeking.

(5) The nature of this case, briefly stated, is as follows.

I believe that I have been unconstitutionally denied, al-ough otherwise entitled to, credit against my sentence r good conduct and efficient and willing performance of ties assigned ("good time" credit) in respect to jail time der subdivision 3 of Section 230 of the Correction Law the State of New York.

Sworn to by Percy Rutherford on September 17, 1970.)

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Affidavit of James Royster in Support of Motion to Proceed in Forma Pauperis.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JAMES ROYSTER, and all other persons similarly situated,

Plaintiffs,

against

JOHN T. DEEGAN, Warden, Auburn Prison, Auburn, N. Y.

I, JAMES ROYSTER, being duly sworn, according to law, state in support of my attached Motion to Proceed in Forma Pauperis.

(1) I am the Plaintiff in the above-entitled case.

(2) I am, because of my poverty, unable to pay the costs of this case.

(3) I am unable to give security for it.

(4) I believe in good faith that I am entitled to the relief I am seeking.

(5) The nature of this case, briefly stated, is as follows.

I believe that I have been unconstitutionally denied, although otherwise entitled to, credit against my sentence for good conduct and efficient and willing performance of duties assigned ("good time" credit) in respect to jail time under subdivision 3 of Section 230 of the Correction Law of the State of New York.

(Sworn to by James Royster on September 18, 1970.)

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Statutory Notice.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 CIVIL 4365

MES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Plaintiffs,

against

UL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants.

S:

Pursuant to the provisions of Title 28, United States de, Sections 2281 and 2284, you are hereby notified that an order dated January 29, 1971, made by the Honorable rris E. Lasker, a hearing has been set by a three-judge rt composed of the Honorable Paul R. Hays, United tes Circuit Judge, the Honorable Charles M. Metzner d Honorable Morris E. Lasker, United States District dges, for the 3rd day of March 1971, at 4:00 p.m. in urtroom 110, United States Court House, Foley Square, w York, New York.

Counsel are directed to comply with the provisions of neral Rule 25 of this Court and with the provisions conned in the order dated January 29, 1971, signed by the norable Morris E. Lasker, a copy of which order is eto annexed.

Dated: New York, New York, February 2, 1971.

JOHN LIVINGSTON
Clerk of the Court

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Statutory Notice.

To:

Attorney for Plaintiffs

James J. McDonough, Esq.
Legal Aid Society of Nassau County, N. Y.
County Court House
Mineola, New York

Attorney for Defendants

Hon. Louis J. Lefkowitz
Attorney General of the State of New York
80 Centre Street
New York, New York

Samuel A. Hirshowitz, Esq.
Michael Colodner, Esq.
of Counsel

70 Civil 4365

Hon. Nelson A. Rockefeller
Governor of the State of New York
Executive Mansion
Albany, New York

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Order of United States District Court, dated January 29, 1971.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

70 CIV. 4365

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Plaintiffs,

against

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants.

It appearing that by an order dated January 25, 1971, the Honorable Henry J. Friendly, Acting Chief Judge of the United States Court of Appeals for the Second Circuit, designated the Honorable Paul R. Hays, United States Circuit Judge, the Honorable Charles M. Metzner, District Judge, and the undersigned to hear and determine this cause, it is

ORDERED that a hearing in this matter shall be held on Wednesday, March 3, 1971, at 4:00 p.m. in Courtroom 110, United States Court House, Foley Square, New York, New York; and it is further

ORDERED that the parties shall submit memoranda and such other papers as they elect on or before Wednesday, February 17, 1971, and that the originals of all papers sub-

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mitted shall be filed with the Clerk of this Court and copies thereof delivered to each member of the three-judge court at his chambers.

Dated: New York, N. Y.
January 29, 1971

MORRIS E. LASKER
Morris E. Lasker
United States District Judge

Attorney for Plaintiffs in 70 Civ. 4365:

James J. McDonough, Esq.
Legal Aid Society of Nassau County, N. Y.
County Court House
Mineola, New York

Attorney for Defendants in 70 Civ. 4365:

Hon. Louis J. Lefkowitz
Attorney General of the State of New York
80 Centre Street
New York, New York

Samuel A. Hirshowitz, Esq.
Michael Colodner, Esq.
of Counsel

Hon. Nelson A. Rockefeller
Governor of the State of New York
Executive Mansion
Albany, New York

Affidavit of Deputy Commissioner John R. Cain.

STATE OF NEW YORK
COUNTY OF ALBANY } ss.:

JOHN R. CAIN, being duly sworn, deposes and says:

I am a Deputy Commissioner in the Department of Correction and make this affidavit in connection with the computation of time in the case of Percy Rutherford, Ossining Correctional Facility #138399.

Section 230 of the New York Correction Law provides that a state prisoner may receive "for good conduct and efficient and willing performance of duties assigned", a reduction in sentence. This credit is generally referred to as "good time".

The statute provides that with respect to inmates of facilities serving an indeterminate sentence the reduction in time "shall be computed upon the minimum term of such sentence, less jail time allowance". In accordance with this statute the computation of an inmate's "good time" is made beginning with his receipt in the facility. According to the records of the Department of Correction of the State of New York, the computation of Mr. Rutherford's sentence is as follows:

Affidavit of Deputy Commissioner John R. Cain.

RE: Percy Rutherford
SS-138399

Robbery 1st 10—0—0/20—0—0
Grand Larceny 2nd— 2—6—0/5 —0—0 concurre

10—	0—	0	Minimum Term
	8—	2	Jail Time
9—	3—28		Minimum less jail time
3—	1—	9	compensation earned
6—	2—19		Term less compensation
66—	11—	4	Date Received
73—	1—22		Minimum date
20—	0—	0	Maximum Term
	8—	2	Jail Time
19—	3—28		Balance
66—	11—	4	Date Received
86—	3—	1	Maximum Expiration date
6—	8—	0	Time Earned
79—	7—	1	Conditional Release Date
86—	3—	1	Maximum Expiration date
3—	4—	0	Time Earned
82—	11—	1	Statutory Release Date

The actual allowance of "good time" is discretionary and is awarded as an incentive for good conduct. It is a means for encouraging participation in programs, efficient work and discipline.

The state correctional system seeks to encourage rehabilitation by work participation by inmates, job training programs and education programs. An inmate can be evaluated in his work and participation in the facility's programs and "good time" granted as an incentive. Prior to being received in the facility, however, an inmate who is in jail is not under the supervision of the State Correction Department and is not involved in the facility program. Since the inmate is not participating in the state programs while in jail there is no opportunity to evaluate him nor need to encourage his participation.

Our facilities are part of the state correction facilities and serve a three-fold capacity with respect to convicted prisoners: They provide the means of imposing the punishment or sentence imposed by the Court; they serve to protect society by segregating and restraining the individual; and they attempt to rehabilitate the inmate. Jails on the other hand serve to provide only the purpose of restricting a prisoner prior to his conviction.

For the reasons mentioned above, the deduction of jail time in determining "good time" is reasonable and logical:

1. Jail and correctional facilities and purposes are different.
2. "Good time" is awarded as an incentive to inmates participating in the State Correction system and under its supervision.

In the computation of the term of Mr. Rutherford, his maximum release date is shown as is his statutory release

date and his conditional release date. To the present time, Mr. Rutherford has not requested consideration for conditional release.

WHEREFORE, it is respectfully requested that the complaint herein be dismissed.

(Sworn to by John R. Cain, October 23, 1970.)

STATE OF NEW YORK }
COUNTY OF ALBANY } ss.:

JOHN R. CAIN, being duly sworn, deposes and says:

I am a Deputy Commissioner in the Department of Correction and make this affidavit in connection with the computation of time in the case of James Royster, Auburn Correction Facility #59875.

Section 230 of the New York Correction Law provides that a state prisoner may receive "for good conduct and efficient and willing performance of duties assigned", a reduction in sentence. This credit is generally referred to as "good time".

The statute provides that with respect to inmates of facilities serving an indeterminate sentence the reduction in time "shall be computed upon the minimum term of such sentence, less jail time allowance". In accordance with this statute the computation of an inmate's "good time" is made beginning with his receipt in the facility. According to the records of the Department of Correction of the State of New York, the computation of Mr. Royster's sentence is as follows:

Affidavit of Deputy Commissioner John R. Cain.

ames Royster, #59875
DCI-971581-X

he calculation of the subject's sentences is as follows:

BURGLARY 3RD

	Minimum	*Maximum*
ce	5— 0— 0	10— 0— 0
erm	1— 1— 9	1— 1— 9
less jail time	3—10—21	8—10—21
le good time	1— 3—17	
less good time	2— 7— 4	

GRAND LARCENY 1ST

ce	5— 0— 0	10— 0— 0
ime	1— 1— 9	1— 1— 9
less jail time	3—10—21	8—10—21
le good time	1— 3—17	
less good time	2— 7— 4	

COMBINED CONSECUTIVE SENTENCES

ry 3rd	2— 7 —4	8—10—21	
Larceny 1st	2— 7— 4	8—10—21	
ined term	5— 2— 8	17— 9—12	
ed in prison	1966— 5—26	1966— 5—26	
um parole date	1971— 8— 3	1984— 3— 7	Maximum expiration date
		6— 8— 0	
		1977— 7— 7	Conditional Release date
		1984— 3— 7	Maximum expiration date
		3— 4— 0	
		1980—11— 7	Statutory Release date

Affidavit of Deputy Commissioner John R. Cain.

The actual allowance of "good time" is discretionary and is awarded as an incentive for good conduct. It is a means for encouraging participation in programs, efficient work and discipline.

The state correctional system seeks to encourage rehabilitation by work participation by inmates, job training programs and education programs. An inmate can be evaluated in his work and participation in the facility's programs and "good time" granted as an incentive. Prior to being received in the facility, however, an inmate who is in jail is not under the supervision of the State Correction Department and is not involved in the facility program. Since the inmate is not participating in the state programs while in jail there is no opportunity to evaluate him nor need to encourage his participation.

Our facilities are part of the state correction facilities and serve a three-fold capacity with respect to convicted prisoners: They provide the means of imposing the punishment or sentence imposed by the Court; they serve to protect society by segregating and restraining the individual; and they attempt to rehabilitate the inmate. Jails on the other hand serve to provide only the purpose of restricting a prisoner prior to his conviction.

For the reasons mentioned above, the deduction of jail time in determining "good time" is reasonable and logical:

1. Jail and correctional facilities and purposes are different.

2. "Good time" is awarded as an incentive to inmates participating in the State Correction system and under its supervision.

In the computation of the term of Mr. Royster, his maximum release date is shown as is his statutory release

Affidavit of Deputy Commissioner John R. Cain.

ate and his conditional release date. To the present time, Ir. Royster has not requested consideration for condi-ional release.

WHEREFORE, it is respectfully requested that the com-laint herein be dismissed.

(Sworn to by John R. Cain, October 23, 1970.)

Opinion of the United States District Court Convening Three Judge Court, dated January 21, 1971.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 CIV. 4365

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Plaintiffs,

against

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants.

APPEARANCES:

JAMES J. MCDONOUGH
Legal Aid Society of Nassau County, N. Y.
County Court House
Mineola, New York
Attorney for Plaintiffs

Of Counsel:
JOEL ZIEGLER
MATTHEW MURASKIN

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
80 Centre Street
New York, New York
Attorney for Defendants

Of Counsel:
SAMUEL A. HIRSHOWITZ
MICHAEL COLODNER

Opinion of the United States District Court Convening Three Judge Court, dated January 21, 1971.

LASKER, D. J.

Plaintiffs James Royster and Percy Rutherford, New York State prisoners in the Auburn and Ossining Correction Facilities, respectively, bring this class action on behalf of themselves and others similarly situated seeking a declaratory judgment that Section 230(3) of the New York Correction Law, under which their "good time" was computed, is unconstitutional, and for an injunction against the alleged discriminatory practices pursued by defendants in application of that statute.

This suit is brought under 42 U.S.C. § 1983 (the "Civil Rights Act") invoking the jurisdiction of this court pursuant to 28 U.S.C. § 1343(3). Plaintiffs now move for the convocation of a three-judge district court under 28 U.S.C. §§ 2281, 2284, to consider the allegations of unconstitutionality and enjoin enforcement of the state statute in question.

Plaintiff Royster was indicted by a Nassau County Court grand jury on June 15, 1965. Upon failing to post a $3,000 bail bond (later increased to $7,500 to cover a second indictment), he was remanded to the Nassau County jail. He was thereafter convicted of burglary in the third degree and grand larceny in the first degree, after a trial by jury, in the Supreme Court, Nassau County. On May 20, 1966, he was sentenced to consecutive sentences of five to ten years on each count, and on May 26, 1966 he was received in state prison. Prior to the latter date, he had spent one year, one month and nine days, or 404 days ("jail time"), in the Nassau County Jail, beginning with the date of his arrest on April 17, 1965.

Plaintiff Rutherford was indicted on January 25, 1966 by the Nassau County Court grand jury and held in $5,000 bail, which he was not able to post. He was convicted, after a jury trial, in the Supreme Court, Nassau County, and

sentenced on November 1, 1966, to concurrent terms of ten to twenty years for robbery in the first degree and two and one-half to five years for grand larceny in the second degree, and a suspended sentence on each of two assault, second degree convictions. By the time he was received in state prison on November 4, 1966, plaintiff Rutherford had spent eight months and two days, or 242 days ("jail time"), in the Nassau County Jail awaiting trial and sentencing.

Although both plaintiffs were entitled to, and did, receive *jail time* credit against the terms of sentence imposed upon them for the period of their incarceration in county jail (Penal Law, § 2193(1)), they did not receive, and under the provisions of Section 230(3) of the Correction Law were not entitled to receive, *good behavior time credit* ("good time credit") for this period of detention served in county jail prior to transfer to state prison.

Plaintiffs contend that if they had received good time credit for the time spent in county jail between arrest and sentence, they would be entitled to appear before the Parole Board several months (in Royster's case, over four months; in Rutherford's, nearly three months) earlier than they will be under the state's present computation pursuant to the language of Section 230(3). Plaintiffs therefore bring this action to compel defendants to recompute their "minimum release dates" (that is, the dates upon which they would first have the right to appear before the Parole Board), contending that they should receive good time credit for the time served in jail prior to their reception at their respective state prisons. Plaintiffs urge that the withholding from them of good time credit for the period of their incarceration in county jail deprives them of equal protection of the laws in violation of the Fourteenth Amendment in that such a method of computing good time discriminates against those

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prisoners who cannot afford or, in some cases, are not even granted, bail while awaiting trial and sentencing.

That Section 230 of the Correction Law sanctions and, indeed, requires the denial of good time credit for the time plaintiffs served in jail seems clear from the face of the statute. Subsection 2 thereof provides that a state prisoner may receive, "for good conduct and efficient and willing performance of duties assigned, a reduction of sentences not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence . . .,"[1] and subsection 3 states that "in the case of an indeterminate sentence prisoner said reduction shall be computed upon the minimum term of such sentence, *less jail time allowance.*" (Emphasis added.) It is on the basis of the statutory formula set forth in these two subsections that an indeterminate sentence prisoner's minimum release (or parole) date is calculated, and it is this method of computation that, plaintiffs claim, deprives them of equal protection of the laws. It should be noted, however, that jail time is *not* excluded from the computation of a prisoner's maximum good time allowance for purposes of determining his "statutory release date" pursuant to subsection 4 of Section 230. This date, which is arrived at by deducting a prisoner's good time allowance from the *maximum* term (not the minimum term, as in the case of the maximum release date) of an indeterminate sentence, is the earliest date on which an inmate *must* be paroled by the Parole Board (unlike the minimum release date, which is the earliest date on which an inmate *can* be paroled at the discretion of the Parole Board). And the New York courts have construed Section 230(4) (which, unlike Section 230(3), does not contain the same explicit language denying credit for jail time) to require that good time credits earned thereunder be allowed not only for time served in state prison but also for pre-sentence

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jail time.[3] Similarly, Section 230(3) itself provides that in the case of prisoners confined in county penitentiaries,[4] as opposed to those confined in state prisons, good time reductions "shall be computed upon the term of the sentence as imposed by the court, including *jail time allowance.*" (Emphasis added.)

The issue here raised is identical to the question presented to this court recently in the case of *Phipps* v. *McGinnis*, 69 Civ. 3236 (S.D.N.Y.). In two unreported decisions (which are annexed hereto and are dated March 20, 1970 and April 13, 1970, respectively), I found that plaintiff had stated a cognizable claim under the Civil Rights Act and that this court had jurisdiction thereof, that the complaint (which was substantially similar to the one here in issue) stated a claim upon which relief could be granted, and, finally, that a substantial constitutional question had been raised requiring the convening of a three-judge district court.[4] I still adhere to these views, and, in the interest of brevity, reference is made without further comment to the earlier opinions.

Inasmuch as the state has adduced substantially more authority in support of its position in these cases than it did at the time of the *Phipps* case, however, a comment is in order on the several bases now suggested by defendants for upholding the rationality of the distinction made by Section 230(3) between jail and non-jail defendants with regard to the awarding of good time credit.

Defendants contend that since county jails and state prisons differ in both their intended goals and available facilities, the deduction of jail time in determining good time is eminently reasonable and logical. Whereas, defendants claim, state correctional facilities are designed to serve a three-fold purpose of imposing punishment, protecting society and, most importantly, rehabilitating the inmate, county jails exist primarily as detention facilities

o restrict prisoners awaiting trial. Similarly, defendants rgue, whereas the facilities in state prisons are equipped o provide long-term educational and vocational programs ith good time granted as an incentive to the inmates to articipate in these programs, county jails are not equipped o provide such services and consequently there is no oportunity to evaluate an inmate's performance, nor need to ncourage his participation, in such programs. Nevertheess, defendants acknowledge that the overriding considerain the granting of good time reductions is the maintenance of prison discipline. (Defendants' Memorandum f Law, dated November 9, 1970, at p. 15). Indeed, a New ork state court which upheld the constitutionality of Sec-on 230(3) has stated:

> "The policy underlying the discretionary grant of good time reductions is clear. The attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behavior while at the same time the fact that reductions can be withheld will inhibit bad conduct." *Perez* v. *Follette*, 58 Misc.2d 319, 321, 295 N.Y.S.2d 231, 233 (Sup. Ct., Dutchess County, 1968); aff'd 31 A.D.2d 600, 295 N.Y.S.2d 608; motion for leave to appeal dismissed as moot, 23 N.Y.2d 737, 296 N.Y.S.2d 569 (1968).

f the legislative purpose of this statute was, as it clearly eems to have been, to encourage good conduct on the part f prisoners, the particular time or place of their inarceration would not appear to be a relevant considera-on. Rather, "it would seem that awarding good time redit for time served *both* before and after sentencing, hether by jail or prison authorities, would serve the reater goal of inducing good behavior by the prisoners roughout the total period of their confinement." *Phipps McGinnis*, supra, 69 Civ. 3236 (S.D.N.Y. March 20, 1970,

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at p. 9). In addition, even assuming as true the asserte disparity in goals and facilities between the two types o institutions, the state itself apparently experiences littl difficulty in granting good time credit for pre-sentence jai time both in the case of the county penitentiary inmat and in the case of the indeterminate sentence prisoner' statutory release date from state prison. In both instance jail time is included in the computation of a prisoner' good time allowance despite the fact that the type of ac tivity required of an inmate to earn good time credit in county penitentiary or in state prison is allegedly vastl different from that which could be required of an in dividual incarcerated in county jail. Finally, it shoul be noted that plaintiffs' requested change in the metho of good time computation for purposes of minimum re lease could probably be implemented without major dif ficulty simply by having county jail authorities certify a the time of a prisoner's receipt in state prison whether o not he is entitled to good time credit for the time he passe in county jail. In fact, whatever method is now used b state authorities to compute the good time allowance of county penitentiary prisoner, or, indeed, of an indeter minate sentence prisoner for purposes of his statutor release, could seemingly be employed here as well. I would not appear equitable that plaintiffs and other prison ers like them should be made to bear the yoke of unequa and prolonged confinement merely because of the adminis trative division of labor between county and state priso authorities.

Defendants also argue that, since county jails are super vised by local officials and not, like state prisons, by stat correction authorities, and since it is these state official who must eventually make the sensitive decision whethe to release a prisoner prior to the expiration of his mini mum sentence or not, the granting of good time (which, i

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turn, determines a prisoner's minimum parole date) should be made only on the basis of personal observation and evaluation of the prisoner's conduct by state officials while he is actually confined in their custody in state prison. But this difficulty, if real, can be easily overcome. If the Board should feel that there has not been sufficient time for evaluation by state officials of the prisoner's conduct and his potential for early release, it can simply refuse to release him, and, barring an excessive abuse of discretion in this regard, such a sensitive determination would not be subject to judicial review. Thus, the very fact that the Board *can* exercise such broad discretion in determining whether to release a prisoner on parole at the time of his minimum release date would seem to compensate for whatever evaluation time may be lost to the Board during the period of a prisoner's county jail incarceration.

Moreover, it would probably often be the case, as it is with regard to the two named plaintiffs herein, that, even with the allowance of good time credit for jail time, the amount of time available to the Parole Board for observation and evaluation of a particular prisoner while in state prison would be only minimally reduced. From the prisoner's point of view, on the other hand, even such a minimal reduction in his time served would surely be of great consequence to him. In plaintiff Rutherford's case, for example, if he were to receive good time credit for the time he spent in county jail prior to sentence, he would spend five years, 11 months and 28 days in state prison (plus eight months and 2 days in county jail) before becoming eligible to meet the Parole Board whereas under the state's present computation he will have to spend six years, two months and 19 days in state prison (plus the eight months and two days in county jail) before he can meet the Parole Board. While the additional two and one-half months in state prison would probably add pre-

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cious little to the sum of the Parole Board's knowledge of plaintiff after nearly six years of observation and evaluation, the possibility of gaining his freedom some 81 days earlier would undoubtedly be a matter of great moment to plaintiff Rutherford and other imprisoned men like him.

Finally, defendants contend that plaintiffs are not really challenging the good time provisions of Section 230, but rather are attacking the consequences of the bail system. Defendants argue that, while there is an obvious difference in treatment between those free on bail and those in custody for failure to make bail, such a classification of "jail versus bail" is a constitutionally permissible one expressly provided for by the Eighth Amendment, and the consequences of such a classification cannot be deemed to constitute invidious discrimination. I do not disagree with this proposition; however, I have serious doubts as to whether it meets the issue at hand. Defendants rely heavily on *Rigney* v. *Hendrick*, 355 F.2d 710 (3d Cir. 1965), cert. denied 384 U.S. 975, where a defendant who was unable to post bail was, while in jail, placed in a line-up that subsequently led to his identification by a victim of another crime. In rejecting his claim of a denial of equal protection, the Third Circuit stated, at 715:

> "Here we cannot find an invidious discrimination for the different methods employed by the police in securing the identification of a suspected criminal are made necessary because of the difference in circumstances in which those free on bail and those detained find themselves. Admittedly, there is a classification between those who can and those who cannot make bail. The Constitution, however, permits such a classification, and any differences here arise solely because of *the inherent characteristics of confinement*

and cannot constitute invidious discrimination." (Emphasis added)

The real question, then, is whether or not the denial of good time credit for jail time is an "inherent characteristic of confinement." While it follows naturally that certain rights, such as "the right of privacy, to earn a livelihood, to vote, to speak freely, to associate with persons of one's choosing," *Morris* v. *Crumlish*, 239 F.Supp. 498, 500 (E.D.Pa. 1965), must be denied to unbailed defendants as a necessary consequence of their confinement, I do not believe that it follows that denial of good time credit is in any way an "inherent characteristic of confinement." Rather, the grant or denial of good time would seem to be a wholly independent creature of statute. Surely the purpose of the Eighth Amendment—to insure, by bail or, for want of that, by pre-trial incarceration, the defendant's appearance in court—would be equally well served whether or not good time credit was subsequently granted for jail time. Thus, it would appear that "while such distinctions *as are necessitated by confinement* while awaiting trial may be made between those who supply bail and those who cannot," *Rigney* v. *Hendrick*, supra, 355 F.2d at 716-717 (dissenting opinion, Freedman, J.) (emphasis added), the unequal denial of good time credit for jail time required by Section 230(3) is not inherently related to such confinement and may well constitute an invidious discrimination.

In any event, as Judge Friendly recently noted, "[t]he issue here is not whether [the state statute] is unconstitutional but whether plaintiffs' claim of unconstitutionality [is] unsubstantial 'either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court [the Supreme Court] as to foreclose the subject.'" *Latham* v. *Tynan*, —— F.2d —— (2d Cir., decided December 16, 1970, Docket

No. 34668, at 850) (dissenting opinion). Plaintiffs' claim herein meets this test of substantiality.

Accordingly, plaintiffs' application for the convening of a three-judge court is granted.

It is so ordered.

Dated: New York, New York
January 21, 1971 .

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

[1] We are here dealing with an "indeterminate sentence," that is, a "sentence to imprisonment in a state prison having minimum and maximum limits fixed by the court." Correction Law, § 230(1).

[2] Under § 230(4) the statutory release date is set at the rate of five days off per month (as opposed to 10 days in the case of the minimum release date), or one-sixth of the maximum expiration date (that is, the maximum date of a sentence to which an inmate can be held if he receives no good time credit whatsoever, either for time served in jail or prison).

It should be noted that the statutory scheme of § 230, which is the subject of this lawsuit, is no longer the law in New York. On September 1, 1967, § 230 was replaced by §§ 803 and 805 of the Correction Law and §§ 70.30 and 70.40 of the new Penal Law, which sections apply to all convictions for offenses committed on *or after that date* (but not to convictions—as of plaintiffs herein—for offenses committed *prior to* the effective date). Significantly, under the new statutory scheme, good time earned on the minimum sentence is abolished altogether, thus removing any question of unequal treatment. An inmate meets with the Parole Board at the expiration of his minimum term regardless of how much good time credit he has earned against his maximum sentence or of how much time he spent in county jail prior to his receipt in state prison. Correction Law, § 805(3); Penal Law, § 70.40(1)(a). Thus,

good time is now credited solely against the maximum term of an indeterminate sentence, and it is awarded without regard to whether a prisoner has served time in county jail prior to sentencing. Correction Law, §§ 803(1), 805(1); Penal Law, §§ 70.30(4), 70.41(1)(b). This calculation is identical to that made formerly pursuant to § 230(4), except that a prisoner may now earn 10 rather than 5 days good time credit per month against his maximum sentence. This computation results in the Department of Correction setting, upon a prisoner's arrival at state prison, a "conditional release date" of one-third off the maximum sentence. As in the case of the statutory release date under § 230(4), a prisoner must automatically be released (if he has not in the interim incurred any penalties which have reduced his good time allowance) upon reaching his conditional release date. In addition, any person covered by § 230(4) of the old Correction Law by reason of having committed the offense for which he was convicted prior to September 1, 1967 is entitled, at any time, to elect to serve his sentence under the provisions of the new Penal Law and the new chapters of the Correction Law, and so be eligible for "conditional release." Correction Law, § 230-a. Neither of the named plaintiffs has as yet made this election, presumably because it would foreclose them from receiving any good time credit whatsoever (either for prison time alone, or, as they now request, for both prison and jail time together) off of their minimum sentences and thus compel them to await the full expiration of their minimum terms before appearing before the Parole Board.

Thus, the scope of this case (and of any proposed class) is necessarily limited, for the challenged statute, § 230(3) of the Correction Law, now applies only to those prisoners who were convicted for offenses committed before September 1, 1967, whose minimum terms have not yet expired, who have not yet met the Parole Board, and who have not as yet elected the conditional release program under § 230-a. Nevertheless, the very existence of the issue in this case attests to the continuing presence and effect of § 230(3).

[3] Such penitentiaries are county correctional institutions maintained, in general, for the confinement of persons convicted of non-felony offenses carrying sentences of one year or less.

[4] In *Phipps*, the three-judge court eventually dismissed the case as moot because by that time the plaintiff had already appeared before the Parole Board for consideration for minimum release. *Phipps* v. *McGinnis*, 69 Civ. 3236 (S.D.N.Y. May 13, 1970). The court, therefore, did not reach the merits of the case.

Opinion of United States District Court in *Phipps v. McGinnis*, dated March 20, 1970, Annexed to Opinion of January 21, 1971.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

69 Civ. 3236

ROBERT E. PHIPPS,

Plaintiff,

against

PAUL D. McGINNIS, Commissioner of Correction and HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York,

Defendants.

APPEARANCES:

Robert E. Phillips, Plaintiff, pro se
Drawer B
Stormville, N. Y. 12582

Louis J. Lefkowitz
Attorney General of the State of New York
Attorney for Defendants
of Counsel: John G. Proudfit.

MEMORANDUM OPINION

LASKER, D. J.

Defendants move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing plaintiff's complaint on the ground that the complaint fails to state a claim upon which relief may be granted. Defendants contend that plaintiff's claim "does not raise a valid issue for consideration by this Court." I disagree.

Opinion of United States District Court in Phipps v. *McGinnis, dated March 20, 1970, Annexed to Opinion of January 21, 1971.*

After arrest, but before conviction, plaintiff spent 488 days in county jail. He is presently in the custody of the Warden of Green Haven Prison, Stormville, New York, where he was received June 5, 1968, after a conviction in Nassau County Court of the crimes of burglary in the third degree, possession of burglar's tools as a felony, and petty larceny. He is serving an indeterminate sentence of 3½ to 5 years. He has been granted jail time credit of 488 days for the time he spent in county jail prior to transfer to state prison. However, he has received no "good behavior time" credit ("good time" credit) for the time so served in jail.

Plaintiff has brought the instant action to compel defendants to recompute his minimum release date (that is, the date upon which he would first have the right to appear before the parole board), contending that he should have received good time credit for the time served in jail prior to his reception at the state prison. As indicated below, if the plaintiff's position is correct he would be entitled to appear before the parole board aproximately five months earlier than he would on the basis of the state's computation. Plaintiff urges that the withholding from him of good time credit for the period of his incarceration in county jail (from the date of his arrest to the date of his delivery to state prison) deprives him of equal protection of the laws in violation of the Fourteenth Amendment in that such a method of computing good time discriminates against a prisoner who cannot afford to obtain bail while awaiting sentencing.

Plaintiff therefore seeks a declaratory judgment that Section 230 of the New York Correction Law under which his so-called good time was computed is unconstitutional, and for an injunction against the alleged discriminatory practices pursued by defendants in application of that statute.

Opinion of United States District Court in Phipps v. McGinnis, dated March 20, 1970, Annexed to Opinion of January 21, 1971.

Plaintiff (moving *pro se*) brings his suit under 42 U.S.C. §§ 1981, 1983 (the "Civil Rights Act") and invokes the jurisdiction of the court under 28 U.S.C. § 1343(3). He also seeks the convocation of a three-judge district court pursuant to 28 U.S.C. §§ 2281, 2284, to consider the allegations of unconstitutionality and enjoin enforcement of the state statute in question. Plaintiff seeks no money damages, but only the recomputation of his time to appear before the parole board.

Defendants present two arguments in support of their motion to dismiss: first, that the court lacks jurisdiction since plaintiff's suit seeks release from prison and attempts improperly to avoid the requirements of 28 U.S.C. § 2254; and second, that in any event the complaint fails to state a claim upon which relief may be granted. I treat these contentions separately below.

JURISDICTION

It is settled that the Civil Rights statute cannot be used by a state prisoner to circumvent established rules of comity and the requirement of the federal statute that habeas corpus shall not be granted unless it appears that the applicant has "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254; *Smartt* v. *Avery*, 411 F.2d 408 (6th Cir. 1969); *Greene* v. *State of New York*, 281 F.Supp 579 (S.D.N.Y. 1967); *Lombardi* v. *Peace*, 259 F.Supp. 222 (S.D.N.Y. 1966). Thus, it has been held that redress of alleged civil rights violations incurred in state criminal proceedings or release from custody of persons imprisoned by state courts may not be secured under the Civil Rights Act. See, e.g., *Martin* v. *Roach*, 280 F.Supp. 480 (S.D.N.Y. 1968); *Peinado* v. *Adult Authority of Department of Corrections*, 405 F.2d 1185

(9th Cir. 1969); *Johnson* v. *Walker,* 317 F.2d 418 (5th Cir. 1963).

In the instant action, however, plaintiff makes no charge of unconstitutional detention resulting from any illegality in his state court trial and conviction. While it is true that the complaint (prepared exceedingly well for a layman, but nevertheless inartistically) does request "discharge to parole", I construe this to constitute a prayer for the right to appear before the parole board and not for release from prison.

Neither the plaintiff's complete nor his immediate liberty is at stake, for even if the relief requested were granted and plaintiff secured an immediate hearing before the parole board, nevertheless the parole board's power is discretionary and an adverse decision would not be subject to judicial review. *United States ex rel. Campbell* v. *Pate,* 401 F.2d 55, 57 (7th Cir. 1968). However, if plaintiff's time has not been properly computed, what he does lose is, as the *Campbell* court phrased it, "the possibility that if he appeared before the board he might persuade it to decide in his favor. Of course this loss, in practical, human, terms is serious and involves a changes for at least qualified liberty." *Id.*

The traditional view is undoubtedly that federal courts have no power to interfere in the internal discipline of state penal institutions. See, e.g., *Wright* v. *McMann,* 387 F.2d 519, 522 (2d Cir. 1967); *Siegel* v. *Ragen,* 180 F.2d 785, 788 (7th Cir. 1950). It is now settled, however, that, although the rights of a person serving a valid state sentence are limited, "he does have some federally protected rights which he may redress by a sec. 1983 action against those who have custody of him." *United States ex rel. Campbell* v. *Pate,* supra, at 57; *Wright* v. *McMann,* supra.

The applicable legal principles are no longer in serious

dispute. The Civil Rights Act specifically creates a cause of action for deprivations, by persons acting under color of state law, of rights secured by the Constitution. See *Monroe* v. *Pape*, 365 U.S. 167 (1961). Furthermore, that state prisoners fall within the protection of 42 U.S.C. § 1983 and may bring an action under the Civil Rights Act is established, *Cooper* v. *Pate*, 378 U.S. 546 (1964); *Wright* v. *McMann*, supra; *Jordan* v. *Fitzharris*, 257 F.Supp. 674 (N.D. Calif. 1966); and a district court has power to grant injunctive relief where there has been a deprivation of civil rights, *Sewell* v. *Pegelow*, 291 F.2d 196 (4th Cir. 1961). Moreover, as distinct from the provisions of 28 U.S.C. § 2254, the Civil Rights Act, when properly relied upon for federal jurisdiction, does not require the exhaustion of state judicial remedies.[2] As the Second Circuit Court stated in *Wright* v. *McMann*, supra, at 522-523:

> "Any remaining belief in the vitality of the exhaustion principle was dispelled when the concurrent jurisdiction of the federal courts in cases under the [Civil Rights] Act was reaffirmed in clear terms in McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963)."

Finally, and perhaps most importantly as to the plaintiff here, it is settled that

> ". . . prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities carried out under color of state law." *Washington* v. *Lee*, 263 F.Supp. 327 (M.D. Ala. 1966) (Johnson, J.)

Indeed, numerous courts have found the presence or absence of an equal protection claim to be of critical impor-

tance in assessing the jurisdictional propriety of the civil rights action in question. See, e.g., *Peinado* v. *Adult Authority of Department of Corrections,* supra, at 1186; *United States ex rel. Campbell* v. *Pate,* supra, at 57; cf. *Burns* v. *Crouse,* 339 F.2d 883, 884 (10th Cir. 1964), cert. denied 380 U.S. 925 (1965).

Accordingly, notwithstanding defendants' construction of plaintiff's complaint as a habeas corpus petition which would require exhaustion of state remedies, I conclude that plaintiff has stated a cognizable claim under the Civil Rights Act and that this court has jurisdiction.[3]

THE MERIT OF THE COMPLAINT

Finding that the jurisdictional requirements have been satisfied, I turn to defendants' contention that no cause of action has been stated upon which relief can be granted. Defendants have apparently computed plaintiff's minimum release date by subtracting the time he served in county jail from his minimum sentence and then dividing by three to determine the maximum good time reduction to which plaintiff might be entitled. Plaintiff, on the other hand, contends that jail time should not be subtracted from the minimum sentence before the maximum allowance for good time is computed.

On its face, Section 230 of the Correction Law would appear to validate defendants' method of computation. Subsection 2 provides that a state prisoner may receive, "for good conduct and efficient and willing performance of duties assigned, a reduction of sentence not to exceed ten days for each month of the minimum term in the case of an indeterminate sentence . . ."[4] Subsection 3 states that "in the case of an indeterminate sentence prisoner said

reduction shall be computed upon the minimum term of such sentence, *less jail time allowance.*" (Emphasis added.)[5] Thus, while jail time itself must be credited against the term of any sentence imposed (Penal Law, § 70.30(3)), a prisoner, seemingly on the basis of the statutory formula set forth above, is denied any good behavior time credit for such jail time when his maximum good time allowance is computed. It is this provision of the statute and this practice which, plaintiff claims, deprive him of equal protection of the laws.

The practical effect of this section, plaintiff contends, is to discriminate against those indigent defendants who cannot afford bail and so must serve time in jail awaiting sentence, while rewarding those fortunate enough to obtain bail prior to judgment with a full allowance of good time credit. In the instant case, plaintiff argues that his inability to furnish bail has resulted in a loss of about five months' good time credit during the sixteen-month period he spent in county jail. He maintains that had he been able to post bail and thereby avoid any jail time prior to sentence, he would have been eligible to appear before the parole board in 28 months (based on a one-third reduction of the minimum sentence), whereas with the loss of the five months' good time noted above, he does not become eligible for parole until a total of some 33 months of confinement (both in county jail and state prison) have elapsed.

In a recent state court proceeding involving an identical claim by another prisoner, the court attempted to explain the rational basis for this otherwise inexplicable distinction in treatment between bail and non-bail defendants. In *Perez* v. *Follette*, 58 Misc.2d 319, 295 N.Y.S.2d 231, 233-234 (Sup. Ct., Dutchess County, 1968), the court stated:

Opinion of United States District Court in Phipps v. *McGinnis, dated March 20, 1970, Annexed to Opinion of January 21, 1971.*

"The policy underlying the discretionary grant of good time reductions is clear. The attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behavior while at the same time the fact that reductions can be withheld will inhibit bad conduct. Necessarily this policy can be implemented only during the time a prisoner is in the actual custody of the officials who will grant or withhold reductions. Thus the time a prisoner is in the custody of others—that is when he is serving jail time before sentence—cannot be counted as time for which good time reductions can be granted or withheld. This is a rational basis for the statute petitioner challenges."

I do not find this reasoning so persuasive or compelling as to warrant a dismissal on the merits of plaintiff's cause of action. On the contrary, it would seem that awarding good time credit for time served *both* before and after sentencing, whether by jail or prison authorities, would serve the greater goal of inducing good behavior by the prisoners throughout the total period of their confinement.

In addition, recent case law suggests a split in authority among the state courts as to the proper interpretation of the statute itself. In *People* v. *Deegan*, 56 Misc.2d 567, 289 N.Y.S.2d 285 (Sup.Ct., Westchester County, 1968), the court was confronted with the identical issue here involved as it applied to the conditional (or maximum), rather than minimum, release date of a state prisoner. Plaintiff there contended that the good behavior allowance provided in Section 230(4) and Section 230-a of the Correction Law contemplated the inclusion of jail time in determining the amount of sentence reduction for conditional release purposes. The state, on the other hand, argued that under the

statute prisoners could be credited with good time only for the time actually served in state prison. Justice Trainor rejected the state's position, observing at 287:

> "Adoption of the respondent's interpretation would have the effect of prejudicing a defendant who was unable to raise funds in order to be released on bail, and would deprive him of 'equal protection of the laws' in violation of the 14th Amendment of the U. S. Constitution. . . . If there is logic or justice in this anomaly it escapes the court."

It is true that Justice Trainor, in construing Section 230(4), was not faced with language explicitly referring to the subject of "jail time" and was therefore able to resolve the ambiguity in favor of plaintiff's personal liberty, whereas here the plaintiff challenges Section 230(3), which specifically refers to deduction of jail time. Indeed, Justice Trainor himself took note of the apparent inconsistency between subdivisions 3 and 4 of Section 230 by stating at 287:

> "It is curious that subdivision 3 of said section . . . specifically mentions 'jail time' in establishing a formula for sentence reduction, while subdivision 4 is silent as to that phrase."

I share Justice Trainor's skepticism as to the internal consistency of a statute which, for conditional release purposes, reduces a prisoner's *maximum* sentence by the amount of good behavior credit accumulated during jail time while, for minimum release purposes, it refuses to discount that same prisoner's *minimum* sentence by the same amount of good time credit earned during the same stay in jail. It would seem that both subsections should follow a single formula with regard to sentence reductions,

Opinion of United States District Court in Phipps v. *McGinnis, dated March 20, 1970, Annexed to Opinion of January 21, 1971.*

and, as stated by Justice Trainor, adherence to the defendants' method of calculation could constitute a violation of the constitutional guarantee of equal protection.

Recently, the Supreme Court, Suffolk County, had occasion to pass on the same question that had earlier come before the *Deegan* court. In *Paul* v. *Warden of the Suffolk County Jail* (New York Law Journal, May 21, 1969, at p. 18, col. 6), Justice Ritchie characterized the uneven treatment of bail and non-bail defendants under Section 230(4) in the following unqualified language:

> "This court is not in agreement with [the] method employed. It is inequitable in that it discriminates against those persons charged with crime that are able to furnish bail upon arraignment and those remanded as a result of inability to furnish bail.
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> . . . .
>
> "This court refuses to countenance such disparity and discrimination and finds it extremely difficult to perceive that such was the intent of the legislation enacted permitting reductions in sentence for good behavior during imprisonment."

For the reasons stated above I find that the court has jurisdiction in the matter and that the complaint states a claim upon which relief may be granted. The defendants' motion to dismiss is hereby denied.

Dated: New York, N. Y., March 20, 1970.

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

[1] The case is before me solely on defendants' motion to dismiss the complaint. However, an examination of the complaint indicates that plaintiff seeks the convening of a three-judge court, but

Opinion of United States District Court in Phippe McGinnis, dated March 20, 1970, Annexed to Opinio of January 21, 1971.

he has made no distinct motion to convene such a court. The cou has secured an offer of counsel to assist defendant with the pr cedural complexities involved.

[2] In passing, it should be noted that plaintiff did in fact fir seek relief in the state courts. He brought an Article 78 proceed ing to compel defendants to recompute the date when he migh first appear before the parole board. On June 19, 1969, the Suprem Court, Dutchess County, relying on the reasoning of *Perez* v. *Fo lette*, infra, dismissed plaintiff's petition. He then brought th instant action in federal court.

[3] Several recent federal cases which sustain the court's accep ance of jurisdiction in the suit at bar are: 1) *United States ex re Campbell* v. *Pate*, supra, in which the Seventh Circuit reversed th district court's dismissal of a state prisoner's § 1983 action an held that his complaint, alleging the capricious reduction of mer time and resultant postponement of the date of his parole hearin stated a claim of denial of equal protection upon which relief coul be granted; 2) *Douglas* v. *Sigler*, 386 F.2d 684 (8th Cir. 1967), i which the Eighth Circuit (and the trial court) accepted jurisdic tion of a state prisoner's civil rights action which alleged that Nebraska state statute relating to a convict's loss of good tim credit for misconduct and the effect of good behavior thereafte was vague, overly broad and ambiguous and thus violative of du process and equal protection under the Fourteenth Amendment and 3) *Rodriguez* v. *McGinnis* (N.D.N.Y. 1969) (not yet officiall reported; unofficially reported in 38 U.S.L.W. 2380, Jan. 13, 1970) where Judge Foley held that a New York state prisoner who wa denied good time credit by Prison Commutation Board that faile to make required written report to Commissioner of Correction on its reasons for denial had been deprived of due process an equal protection of the law, and was therefore entitled to a § 198 injunction requiring prison authorities to credit this time to parol and to conditional release forthwith.

[4] We are here dealing with an "indeterminate sentence," that i a "sentence to imprisonment in a state prison having minimum an maximum limits fixed by the court." Correction Law, § 230(1).

[5] Apparently the only exception to this rule is in the case of prisoner confined in a county penitentiary, whose "reduction sha be computed upon the term of the sentence as imposed by th court, *including jail time allowance.*" Correction Law, § 230(3) (Emphasis added.) Such a distinction within the very section itsel would seem to raise possible equal protection objections.

Opinion of United States District Court in *Phipps* v. *McGinnis*, dated April 13, 1970, Annexed to Opinion of January 21, 1971.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

69 Civ. 3236

ROBERT E. PHIPPS,

Plaintiff,

against

PAUL D. MCGINNIS, Commissioner of Correction and HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York,

Defendants.

MEMORANDUM OPINION

APPEARANCES:

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LASKER, D. J.

Robert E. Phipps, the plaintiff, is a New York State prisoner at Green Hill Prison, Stormville, New York. He

brought suit by pro se complaint under 42 U.S.C. §§ 1981, 1983 (the "Civil Rights Act") invoking the jurisdiction of the court under 28 U.S.C. § 1343(3), seeking a declaratory judgment that Section 230 of the New York Correction Law is unconstitutional, and for an injunction against alleged discriminatory practices pursued by the defendants in accordance with that statute. Prior hereto the defendants moved, pursuant to Rule 12(b) (6), F.R.Civ.P., to dismiss plaintiff's complaint on the ground that it failed to state a claim upon which relief could be granted. By memorandum opinion of March 20, 1970, I denied the motion.

Plaintiff is presently represented by counsel and has filed an amended complaint, which he is entitled to do as a matter of right under Rule 15(a), F.R.Civ.P., this being his first amended pleading and no responsive pleading having been served since the filing of the original complaint.

Plaintiff now moves for the convening of a district court of three judges under 28 U.S.C. § 2281, et seq., and seeks a determination that the case is properly brought as a class action under Rule 23, F.R.Civ.P. Plaintiff is serving an indeterminate sentence of three and one-half to five years. Prior to his conviction he served 488 days in county jail awaiting trial. Although he received jail time credit for this period of detention pursuant to New York Penal Law § 70.30(3), he has not received, and under the provisions of Section 230(3) of the Correction Law he apparently is not entitled to receive, good behavior time credit ("good time credit") for the period he spent in jail between arrest and sentence. If the plaintiff had received good time credit for the time he spent in county jail between arrest and sentence, he would have been entitled to appear before the Parole Board approximately five months earlier

than he will be as the result of the lesser credit allowed by Section 230(3).

The burden of plaintiff's complaint is that Section 230 of the Correction Law violates the Fourteenth Amendment to the Constitution of the United States because it denies equal protection of the law to indigent people who cannot afford to obtain bail between arrest and sentence. He argues that those who can furnish bail prior to sentence earn a full allowance of good time credit for the entire period which they ultimately spend in custody, whereas indigent defendants who are jailed between arrest and sentence because of their inability to furnish bail are not entitled under the statute to good time credit for the time spent in jail.

The amended complaint is substantially identical to Phipps' original complaint except that it expressly applies for the convening of a three-judge court and states that plaintiff has instituted the suit as a class action in a representative capacity on behalf of all inmates of prisons of the State of New York who have been denied good time credit under the provisions of Section 230. Although the issues before me on defendants' motion to dismiss the original complaint are not precisely the same as those now presented, there is a substantial similarity between them, and reference is made to the views which I expressed in my prior memorandum opinion as to the validity of plaintiff's complaint.

The question before me now is whether a three-judge court should be convened. The criteria necessary to such a determination were described by the Supreme Court in *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715, 82 S.Ct. 1294, 8 L.Ed.2d 794, as follows:

> "When an application for a satutory three-judge court is addressed to a district court, the court's inquiry is

Opinion of United States District Court in Phipps v. McGinnis, dated April 13, 1970, Annexed to Opinion of January 21, 1971.

appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute."

The Court of Appeals of this Circuit has made it clear in the recent decision in *Heaney, et al*, v. *Allen, et al* (—— F.2d ——, slip Opinion No. 389, decided February 5, 1970), that these criteria must be seriously applied and that a three-judge court is not to be convened unless the district judge to whom the application is made finds that the issue before him presents a substantial constitutional question.

Since Section 230 acknowledgely has state-wide application (and therefore clearly comes within the provisions of 28 U.S.C. § 2281), and since plaintiff's amended complaint clearly alleges injury for which equitable relief may be appropriate, the only matter to be determined is the substantiality of the plaintiff's constitutional claim.

As indicated above, plaintiff argues that Section 230 violates the Fourteenth Amendment, since the effect of the statutorily prescribed method of computing minimum release dates is to penalize indigents as compared to non-indigents because of their failure to raise bail.

I find the plaintiff's constitutional claim to be substantial. In the landmark decision of *Griffin* v. *Illinois*, 351 U.S. 12 (1956), the Supreme Court established that the Equal Protection and Due Process clauses protect prisoners from invidious discrimination on account of poverty. In that case the Court held that, while a state could constitutionally deny the right of appeal, once it affords that right to persons convicted of crime it cannot effectively

condition the right "in a way that discriminates against some convicted defendants on account of their poverty." 351 U.S. at 18.

In *Bynum* v. *Connecticut Commission of Forfeited Rights*, 410 F.2d 173 (2d Cir. 1969), Judge Kaufman held that an attack on Connecticut's procedures for enabling ex-felons to regain the right to vote in elections raised constitutional questions substantial enough to require the convening of a three-judge court. The plaintiff's claim in *Bynum* was that Connecticut's requirement that ex-felons pay a $5 fee in order to gain consideration of their petition to regain the right to vote unjustly discriminated against the poor because wealth or fee payments have no relation to voting qualifications. The Court of Appeals concluded that this claim raised substantial constitutional questions. Similarly, the Court in *Gilmore* v. *Lynch*, 400 F.2d 228 (9th Cir. 1968), held that an Equal Protection claim challenging California prison regulations which prevent prisoners from keeping law books or reference material had sufficient constitutional merit to require the convening of a three-judge court. The appellants had contended that the prison regulations would enable affluent prisoners who could obtain outside counsel for legal research to gain effective access to the courts, whereas indigent prisoners' access would be limited.

Applying the principle of *Griffin* v. *Illinois*, *supra*, and its progeny to this case, it follows that, although New York State may not be required to grant parole[1] to plaintiff and others similarly situated, once it has undertaken to provide procedures for granting parole it cannot withhold or delay those procedures for reasons resulting from the prisoners' indigency, unless there are rational purposes for doing so. As I observed in my previous opinion, there appear to be no overriding justifications for the New York scheme for

computing good time credit, and two state decisions have impliedly questioned its constitutionality.[2] In these circumstances, it appears that plaintiff's claim has merit. Nor is it foreclosed by previous decisions of a higher court, cf. *California Water Service* v. *City of Redding*, 304 U.S. 252, 255, 58 S.Ct. 865, 867, 82 L.Ed. 1323 (1938).

Accordingly, the plaintiff's motion for the convening of a three-judge court under Title 18, §§ 2281, 2284, is granted for the purpose of determining the constitutionality of Section 230 of the New York Correction Law. A determination as to whether the suit has been properly brought as a class action will be deferred for consideration by the three-judge court itself.

It is so ordered.

Dated: New York, N. Y., April 13, 1970.

MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

[1] It is true, as stated in my prior memorandum opinion, that neither the plaintiff's complete nor immediate liberty is at stake, since the Parole Board has the discretion to refuse parole even if he appears before the Board. However, the plaintiff's loss may nevertheless be real, for, as stated in *United States ex rel Campbell* v. *Pate*, 401 F.2d 55, 57:

> "What he is losing, . . . is the possibility that if he appeared before the board he might persuade it to decide in his favor. Of course, this loss, in practical, human, terms is serious and involves a chance for at least qualified liberity."

[2] *People* v. *Deegan*, 56 Misc.2d 567, 289 N.Y.S.2d 285 (Sup. Ct. Westchester County, 1968); *Paul* v. *Warden of the Suffolk County Jail* (New York Law Journal, May 21, 1969, at p. 18, col. 6).

Opinion of the Three Judge District Court, Filed August 23, 1971.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

70 Civ. 4365

JAMES ROYSTER, PERCY RUTHERFORD and all other persons similarly situated,

Plaintiffs,

against

PAUL D. MCGINNIS, *Commissioner* of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants.

Before HAYS, Circuit Judge and METZNER and LASKER, District Judges.

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Opinion of the Three Judge District Court, filed August 23, 1971.

LASKER, D. J.

Two New York State prisoners have brought this class action seeking a declaratory judgment that Section 230(3) of the New York Correction Law, under which their "good time" was computed, is unconstitutional and an injunction against the alleged discriminatory practices pursued by defendants in application of that statute.

Plaintiffs attack the constitutionality of the provision in § 230(3) which denies state prisoners good time credit for the period of their pre-sentence incarceration in county jail. They contend that the denial of such good time credit deprives them of equal protection in violation of the Fourteenth Amendment by discriminating against those prisoners who cannot afford or are not granted bail prior to trial and sentencing.

This suit is brought under 42 U.S.C. § 1983 (the Civil Rights Act), with federal jurisdiction predicated on 28 U.S.C. § 1343(3). By opinion and order dated January 21, 1971, this court, having found that a substantial constitutional question had been raised, granted plaintiff's application to convene a three-judge court. *Royster* v. *McGinnis*, —— F. Supp. —— (S.D.N.Y. January 21, 1971).

Plaintiffs James Royster and Percy Rutherford are inmates of the Auburn and Ossining Correction Facilities, respectively. They bring this action on behalf of themselves and other state prisoners similarly situated who have served terms of incarceration in county jail prior to their transfer to state prison but have not received good time credit therefor. Royster, having been unable to post the requisite bail bond at the time of arrest, served one year, one month and nine days, or 404 days ("jail time"), in the Nassau County Jail prior to his transfer to state prison to serve consecutive five to ten years terms for burglary in the third degree and grand larceny in the first

egree. Rutherford also failed to make bail and, as a esult, spent eight months and two days, or 242 days "jail time"), in the Nassau County Jail prior to his trial, entencing, and receipt in state prison to serve concurrent erms of ten or twenty years for robbery in the first de- ree and two and one-half to five years for grand larceny n the second degree.

Although plaintiffs did receive *jail time* credit against he terms of their sentences for the period of their county ail incarceration,[1] they did not receive, and under the rovisions of § 230(3) were not entitled to receive, any *ood behavior time* credit ("good time") for this period f detention served prior to transfer to state prison. Con- ending that they should have received good time credit or the jail time so served, plaintiffs now seek to compel efendants to recompute their "minimum release dates" that is, the dates upon which they would first have the ight to appear before the Parole Board). They point ut, and it is not disputed, that were they to receive good ime credit for time spent in county jail between arrest nd sentence, they would be entitled to appear before the arole Board several months (over four months, in oyster's case; nearly three months, in Rutherford's) arlier than they will under the computation required by 230(3).

There is no doubt that by its express wording Section 30 mandates the denial of good time credit for the time laintiffs served in county jail awaiting trial and sentenc- ng. Subsection 2 thereof provides that a state prisoner ay receive, "for good conduct and efficient and willing erformance of duties assigned, a reduction of his sen- ence not to exceed ten days for each month of the mini- mum term in the case of an indeterminate sentence . . .," nd subsection 3 states that "in the case of an indetermi-

nate sentence prisoner said reduction shall be computed upon the minimum term of such sentence, *less jail time allowance*" (emphasis added). However, while jail time *is* excluded from the calculation of an indeterminate sentence prisoner's maximum good time allowance for purposes of determining his minimum release (or parole) date under § 230(3), it is *not* excluded from such computation when it comes to setting the same prisoner's "statutory release date" pursuant to subsection 4 of Section 230. The latter date is the earliest date on which an inmate *must* be paroled by the Parole Board and is arrived at by deducting a prisoner's total good time allowance (five days per month) from the *maximum* term of his indeterminate sentence. By contrast, the minimum release date signifies the earliest date on which an inmate *may* be paroled at the discretion of the Parole Board, and it is computed by deducting the prisoner's total good time credit (ten days per month) from the *minimum* term of his indeterminate sentence.

It is significant that the New York courts[3] have construed § 230(4) (which, unlike § 230(3), does not contain the same explicit language denying good time credit for jail time) to require that good time credits earned thereunder be allowed not only for time served in state prison but also for presentence jail time.[4] Similarly, § 230(3) itself provides that in the case of prisoners confined in county penitentiaries,[5] as opposed to those confined in state prisons, good time reductions "shall be computed upon the term of the sentence as imposed by the court, *including jail time allowance*" (emphasis added).

JURISDICTION

In the earlier opinion of the single district judge convening this three-judge court, *Royster* v. *McGinnis*, *supra*,

the court determined that plaintiffs had stated a cognizable claim under the Civil Rights Act over which the court had jurisdiction, and that the complaint stated a claim upon which relief could be granted. In that opinion substantial reliance was placed, as it is here in the interest of judicial economy, on a prior decision of this court in the case of *Phipps* v. *McGinnis*, —— F.Supp —— (S.D.N.Y. March 20, 1970), in which the precise question now before this three-judge court was presented.[6] In *Phipps*, as here, defendants claimed that the court lacked jurisdiction because plaintiff's suit, in effect, sought release from prison and, as such, attempted improperly to avoid the exhaustion requirements of 28 U.S.C. § 2254. At this point it need only be reemphasized that where a plaintiff seeks neither release from custody nor redress of alleged civil rights violations incurred in his state criminal proceedings, relief by way of habeas corpus is inappropriate. In the instant action, plaintiffs make no charge of unconstitutional detention resulting from illegalities in their state court trials. Nor is plaintiffs' complete or immediate liberty at stake, for even if plaintiffs were to secure earlier hearings before the Parole Board, the Board would still retain ultimate discretion to refuse them release on parole.[7]

What *is* clearly at stake, however, is the possible deprivation to plaintiffs of rights secured to them by the Constitution, namely, their right to equal treatment under the law, guaranteed by the Fourteenth Amendment. The Civil Rights Act creates a cause of action precisely to relieve such a deprivation, *Monroe* v. *Pape*, 365 U.S. 167 (1961), and state prisoners fall clearly within its protection. *Cooper* v. *Pate*, 378 U.S. 546 (1964); *Wright* v. *McMann*, 387 F.2d 519 (2d Cir. 1967); *Sewell* v. *Pegelow*, 291 F.2d 196 (4th Cir. 1961). Moreover, unlike the federal habeas corpus statute (28 U.S.C. § 2254), the Civil Rights Act, when properly relied upon for federal jurisdiction, does

not require the exhaustion of state judicial remedies *Wright* v. *McMann, supra,* 387 F.2d at 522-523. Thus, this court has jurisdiction of the issues raised by the complaint herein and may determine the merits.

THE MERIT OF THE COMPLAINT

The burden of plaintiffs' complaint is that Section 230(3) of the Correction Law violates the Fourteenth Amendment because it denies equal protection of the law to those persons who cannot afford to obtain bail (or are not granted bail) between arrest and sentence and so must serve time in jail awaiting judgment. Plaintiffs argue that whereas those fortunate enough to obtain bail prior to sentence are rewarded with a full allowance of good time credit for the entire period which they ultimately spend in custody (in state prison), those defendants (indigent and otherwise) who are jailed between arrest and sentence because of their inability to furnish bail are denied good time credit for the time spent in county jail and must content themselves with the partial measure of credit allotted to them for the period of their state prison confinement alone. Such a difference in treatment between persons sentenced to state prison for like terms of imprisonment smacks of discrimination on its face.

Thus, the real question, and indeed the only question before the court is whether a rational basis exists for the distinction made by § 230(3) between jail and non-jail defendants in the awarding of good time credit. We find the requisite rationality lacking. It is true that the Equal Protection Clause requires only that "the State's action be rational based and free from invidious discrimination." *Dandridge* v. *Williams,* 397 U.S. 471, 487 (1969). Indeed even though a state's practice may be discriminatory and

substantially harm those who are the subject of the discrimination, the practice may still be constitutionally permissible if it serves a valid governmental objective. Thus, for example, although the requirement of bail pending trial substantially discriminates against the indigent defendant, such a classification of "jail versus bail" is constitutionally sanctioned by the Eighth Amendment as a reasonable means for insuring a defendant's appearance in court. See, e.g., *Morris* v. *Crumlish*, 239 F.Supp. 498, 500 (E.D. Pa. 1965). Nevertheless, while laws may create such distinctions and classifications, they must be related to the purposes of the law itself, and artificial distinctions not so reasonably related will not be countenanced.

It is defendants' position that state prisons differ from county jails in respect to purpose, use and availability of facilities and that the exclusion of jail time in the computation of good time is therefore altogether reasonable and proper. They point out that state prisons (unlike county jails, which exist primarily as detention facilities) are designed to serve the additional goal of rehabilitation, and as a result maintain long-term educational and vocational programs (absent from the county jail system) to meet that end. Defendants contend that good time is granted as an incentive to the inmates to participate in these prison rehabilitation programs and that, since county jails are not equipped to provide such services, there is no basis for granting good time for time served therein. If it were clear that the awarding of good time was based solely and exclusively on an evaluation of an inmate's performance in such programs so endemic to the state prison system, the denial of good time for jail might be understandable; however, this does not appear to be the case. Rather, it seems that the overriding consideration in the granting of good time reductions is the maintenance of prison discipline. Defendants themselves have

observed upon the legislature's recognition of good time credit as "an effective disciplinary device" (Defendants' Memorandum, p. 20), and indeed, a New York state court, even though upholding the constitutionality of § 230(3), has stated:

> "The policy underlying the discretionary grant of good time reductions is clear. The attitude and conduct of prisoners should improve if they are offered an incentive for good and productive behavior while at the same time the fact that reductions can be withheld will inhibit bad conduct." *Perez* v. *Follette*, 58 Misc.2d 319, 321, 295 N.Y.S.2d 231, 233 (Sup.Ct., Dutchess County, 1968); aff'd 31 A.D.2d 600, 295 N.Y.S.2d 608; motion for leave to appeal dismissed as moot, 23 N.Y.2d 737, 296 N.Y.S.2d 569 (1968).

That good time is granted primarily as an incentive for good behavior and as a deterrent to misconduct is demonstrated in other more practical ways as well. Surely the state's argument is undercut when it is realized that a prisoner is immediately and automatically credited with a maximum allowance of good time credit for *future* good behavior at the time his minimum parole date is initially fixed upon his arrival in state prison. In effect, then, a prisoner does not "earn" good time credit as time goes on for exemplary performance in assorted prison programs but rather simply avoids being penalized for bad behavior. Indeed, Section 235[8] expressly provides that good time may be withheld in whole or in part as "punishment for offenses *against the discipline* of the prison or penitentiary" (emphasis added), and that unless credit is so withheld as punishment, the "[r]eduction credited to a prisoner in the first instance, . . ., shall stand as the reduction allowed."

Defendants' position is also undermined by the fact that the state *does* grant good time credit for pre-sentence jail time both in the case of the county penitentiary inmate and in the case of the indeterminate sentence prisoner's statutory release date from state prison.[9] As the convening court observed,

> "In both instances jail time is included in the computation of a prisoner's good time allowance despite the fact that the type of activity required of an inmate to earn good time credit in a county penitentiary or in state prison is allegedly vastly different from that which could be required of an individual incarcerated in county jail." *Royster* v. *McGinnis*, supra, —— F.Supp. at ——.

Defendants attempt to explain this anomaly by suggesting that, since release of a state prisoner at the time of his statutory release date (that is, prior to the *maximum* date of his indeterminate sentence) and release of a county penitentiary inmate (that is, one convicted of a non-felony offense) do not require the Parole Board to make nearly so sensitive an evaluation of a prisoner's conduct and potential for early release as it must in deciding to release a prisoner prior to the expiration of his *minimum* term set by a sentencing judge, the legislature[10] could reasonably decide to grant such prisoners credit for good conduct in county jail regardless of the evaluation time lost to the Parole Board as a result thereof.

Whatever the merit in defendants' attempted distinction (see below), the fact remains that state prisoners can be, and, under certain circumstances, are, granted good time credit for jail time for reasons other than as a reward for participation in the various rehabilitative programs of the state prison system. The awarding of good time for jail time to these two classes of prisoners only reinforces the

belief that the legislature's primary aim in enacting the good time statute was to foster and insure the maintenance of prison discipline. If this be the case, as it clearly seems to be, the particular time or place of an inmate's incarceration would be irrelevant to a determination of his maximum good time allowance, for the granting of good time credit for time served *both* before and after sentencing, whether by county jail or state prison authorities, "would serve the greater goal of inducing good behavior by the prisoners throughout the total period of their confinement." *Phipps* v. *McGinnis*, supra, —— F.Supp. at —— (March 20, 1970).

In this regard it should be noted that plaintiffs' requested change in the method of computing good time credit for minimum release could undoubtedly be accomplished without imposing great expense or administrative burden upon the state. County jail officials could simply certify to state prison authorities whether or not a particular prisoner is entitled to good time credit for the time he spent in the county institution. In fact, as the convening court observed earlier, "whatever method is now used by state authorities to compute the good time allowance of a county penitentiary prisoner, or, indeed, of an indeterminate sentence prisoner for purposes of his statutory release, could seemingly be employed here as well." *Royster* v. *McGinnis*, supra, —— F.Supp. at ——.[11]

Thus, while it may be technically true that state officials have no jurisdiction, at least from an administrative point of view, over inmates awaiting trial in county jails, it is grossly unfair that "plaintiffs and other prisoners like them should be made to bear the yoke of unequal and prolonged confinement merely because of the administrative division of labor between county and state prison authorities." *Royster* v. *McGinnis*, supra, —— F.Supp. at ——. Certainly this is all the more so where, as here, county

officials are fully able and equipped to help state authorities achieve the *legislative* goal of prisoner discipline at all correctional levels and the *constitutional* goal of equal treatment under the law. In a case such as this, involving the deprivation of rights secured by the Fourteenth Amendment, both state and county institutions must surely be deemed agencies of the same state government. A distinction in the allowance of good time credit cannot rationally be drawn based upon the type of institution in which the incarceration occurs.

Defendants make one further argument for rationality based upon the purported difference in roles between state prison and local jail officials. They contend that, since it is the state (and not the county) correction authorities who must ultimately make the sensitive decision whether to release a prisoner prior to the expiration of his minimum sentence, the granting of good time (which, in turn, leads to an earlier minimum parole date) should be based solely on the personal evaluation of a prisoner's conduct by state officials while he is actually confined in their custody. In other words, good time credit should not be awarded for jail time because it will result in a prisoner being released on parole before state authorities have had an adequate opportunity to pass upon his readiness therefor. Such fears are wholly illusory, however, for the mere granting of good time credit for jail time need not inhibit state officials in any way in the execution of their admittedly delicate duties. The awarding of good time in and of itself in no way compels the Parole Board to release a prisoner before it has had sufficient time to evaluate him and assure itself of his amenability to parole.[12] Indeed, it is quite possible that, even if a prisoner had been under the careful eye of state prison authorities for the entire period of his incarceration and had earned good time credit throughout such period, the Board might

still feel that he should not be released (and, in fact, would not have to release him) at the time of his minimum parole date. Thus, while the Parole Board's actual decision to release a prisoner on parole should certainly be based on adequate personal observation and evaluation by the releasing officials themselves,[13] the mere decision to award a prisoner good time for time spent in county jail need not be so based since the granting of good time (whether for time served in jail *or* prison) is simply not synonymous with actual release from prison—at least in the case of minimum release. Indeed, Section 213 specifically provides that:

> "Discretionary release on parole shall *not* be granted merely as a reward for good conduct or efficient performance of duties assigned in prison, but only if the board of parole is of opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society." (emphasis added).

Defendants' final contention—that plaintiffs are really not challenging the good time provisions of § 230 but rather the consequences of the bail system—was fully considered in the opinion of the convening court, and this court adopts those conclusions.[14]

Class Action

The requirements of Rule 23, Fed.R.Civ.P., having been met, plaintiffs' request for the declaration of a class action is granted. The class which plaintiffs seek to represent is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class;

he claims of the representative parties are typical of the laims of the class; the representative parties will protect, nd in fact have protected, fairly and adequately the inter- sts of the class; and the defendants have acted on grounds enerally applicable to the class, thereby making appro- riate final injunctive and declaratory relief with respect o the class as a whole. That this suit should be main- ained as a class action is demonstrated by defendants' wn representation that "any final decisions by the federal courts declaring the provision of the statute unconsti- tutional would be accepted and implemented by the state not only with respect to plaintiffs, but with respect to all prisoners whose time is computed pursuant to the statu- tory provision" in question. (Defendants' Memorandum, p. 41). Defendants' suggestion (rather inconsistent with the latter representation) that class relief is inappropriate here because "[m]any prisoners no doubt have received sentences which take into account the fact that good time cannot be earned on jail time" (Defendants' Memorandum, p. 41) is without any support in the record and altogether hypothetical. In view of the constitutional deprivation imposed on plaintiffs and their class by § 230(3), this court cannot simply "presume" that any, let alone all, of the numerous sentencing courts involved meticulously ad- justed the sentences they imposed to compensate for the statutory denial of good time credit (often of only a few days duration) here declared unconstitutional.

Inasmuch as it would be impracticable and potentially disruptive of prison routine to require that notice be given to class members of plaintiffs' action and the decision herein, and inasmuch as notice is not necessary "for the protection of the members of the class or otherwise for the fair conduct of the action," Rule 23(d), Fed.R.Civ.P., notice to the members of the class need not be given. Indeed it is difficult to imagine that any member of the class would "opt out" if he were given notice.

In view of the foregoing, § 230(3) of the New York Correction Law, insofar as it denies good time credit for jail time to indeterminate sentence prisoners in the computation of their minimum release dates, is hereby declared unconstitutional, and defendants will be permanently enjoined and restrained from enforcing it so as to deny such credit to plaintiffs and members of their class. The class is defined to include all prisoners who are presently serving indeterminate sentences[1] in state prison for offenses committed prior to September 1, 1967, who served time in county jail prior to trial and sentence to state prison, who have not yet reached their minimum release date, and who have not as yet elected the conditional release program under § 230-a of the Correction Law.

Submit decree on notice.

Dated: New York, New York
August , 1971

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U.S.C.J.

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U.S.C.J.

MORRIS E. LASKER
U.S.D.J.

Filed
Aug 23, 1971

FOOTNOTES

[1] See Penal Law, § 2193(1), repealed as of September 1, 1967, but in effect at the time plaintiffs were committed to state prison. Section 2193(1) has been replaced in the new Penal Law by § 70.30 (3).

Opinion of the Three Judge District Court, filed August 23, 1971.

[3] We are here concerned with an "indeterminate sentence," that is, a "sentence to imprisonment in a state prison having minimum and maximum limits fixed by the court." Correction Law, § 230(1).

[4] See *People* v. *Deegan*, 56 Misc.2d 567, 289 N.Y.S.2d 285 (Sup.Ct., Westchester County, 1968); *Paul* v. *Warden of the Suffolk County Jail* (New York Law Journal, May 21, 1969, at p. 18, col. 6).

[5] For a more extensive analysis of the relationship between §§ 230(3) and (4), as well as the pertinent provisions of the new Penal Law and the new chapters of the Correction Law, see footnote 2 in the opinion of the convening court herein, *Royster* v. *McGinnis*, supra, —— F.Supp. ——. It should be noted, however, that the statutory scheme of § 230, which is the subject of this lawsuit, is no longer the law in New York. On September 1, 1967, § 230 was replaced by §§ 803 and 805 of the Correction Law and §§ 70.30 and 70.40 of the new Penal Law, which sections apply to all convictions for offenses committed *on or after that date* (but not to convictions—as of plaintiffs herein—for offenses committed *prior to* the effective date).

Thus, the scope of this case (and of the proposed class) is necessarily limited, for the challenged statute, § 230(3) of the Correction Law, now applies only to those prisoners who were convicted for offenses committed before September 1, 1967, whose minimum terms have not yet expired, who have not yet met with the Parole Board, and who have not yet elected the "conditional release" program offered by the new law and made available to old law prisoners by § 230-a of the Correction Law. Of these prisoners, a smaller class yet—comprised of those inmates who served time in county jail prior to sentence to state prison—actually feel the effect of § 230(3)'s proscription against good time credit for jail time. Nevertheless, the briefs in this case attest to the continuing effect of that mandate on a substantial number of individuals.

[6] Such penitentiaries are county correctional institutions maintained, in general, for the confinement of persons convicted of non-felony offenses carrying sentences of one year or less.

[7] In *Phipps*, a three-judge court eventually dismissed the case as moot because by that time the plaintiff had already appeared before the Parole Board for consideration for minimum release. *Phipps* v. *McGinnis*, 69 Civ. 3236 (S.D.N.Y., May 13, 1970). The court, therefore, did not reach the merits.

Opinion of the Three Judge District Court, filed August 23, 1971.

[7] Plaintiff's loss is nevertheless quite real, for, as stated in *United States ex rel. Campbell* v. *Pate*, 401 F.2d 55, 57 (7th Cir. 1968):

> "What he is losing, . . ., is the possibility that if he appeared before the board he might persuade it to decide in his favor. Of course this loss, in practical, human, terms is serious and involves a chance for at least qualified liberty."

In any event, whatever the value to plaintiffs of this *chance* for qualified liberty, it is hardly the equivalent of actual release from custody and as such is distinguishable from recent decisions of our Court of Appeals, *Rodriguez* v. *McGinnis*, —— F.2d ——, Dkt. No. 34567 (2d Cir., March 16, 1971); *United States ex rel. Katsof* v. *McGinnis*, —— F.2d ——, Dkt. No. 35300 (2d Cir., March 29, 1971), holding that where release from penal custody is sought, the habeas corpus statute—and not the Civil Rights Act—provides the appropriate remedy and requires the exhaustion of state remedies.

[8] Section 235 (as well as the other provisions of Article 9 of the Correction Law) was repealed as of the 60th day after May 8, 1970, but it and most of the other provisions here relevant continue to apply in cases—such as plaintiffs'—where the sentence involved is for an offense committed prior to September 1, 1967, the effective date of the new Penal Law. See note under § 230, Correction Law (McKinney Supp. 1970).

[9] Indeed, at oral argument, the court was informed that when state prisoners are returned, subsequent to their original transfer to state prison, to county authorities in connection with court appearances on post-trial writs of coram nobis, they are granted good time credit for such jail time as well.

[10] The history of § 230 reveals that, at least with regard to the computation of a prisoner's statutory release date under § 230(4), it was the courts—and not the legislature—which decided that good time credit must be granted for time served in county jail. See the cases cited in footnote 3 above and accompanying text.

[11] Significantly enough, a close reading of the Correction Law suggests that an administrative mechanism for the computation of a state prisoner's good time credit for jail time for purposes of minimum release has long been available to defendants, and that county jail officials themselves have been long accustomed to judging their own prisoners' eligibilty for good time credit under a statutory standard almost identical to that imposed upon state cor-

rection authorities by § 230. See Correction Law, §§ 250, 252, now repealed but still applicable in cases where the sentence involved is for an offense committed prior to September 1, 1967, and note under §§ 250-254, Correction Law (McKinney Supp. 1970). Nor would there appear to be any difficulty involved in the transfer of an inmate's *good time* record from county jail to state prison authorities, for county officers have for many years been required to deliver to state authoriites, upon a prisoner's commitment and transfer to state prison, very similar records regarding such prisoner's *jail time* credit. See § 2193(1) of the old Penal Law and § 489-a of the Code of Criminal Procedure.

[12] As the convening court noted, "If the Board should feel that there has not been sufficient time for evaluation by state officials of the prisoner's conduct and his potential for early release, it can simply refuse to release him, and, barring an excessive abuse of discretion in this regard, such a sensitive determination would not be subject to judicial review." *Royster* v. *McGinnis*, supra, —— F.Supp. at ——.

[13] It is interesting to note that the sensitive decision to release a prisoner on parole is not even made by those correction authorities who have actually had the prisoner under their supervision during the period of his state prison incarceration. Rather, this determination is vested solely within the discretion of the Parole Board under the criteria set forth in § 213 infra. The Department of Correction, by awarding the requisite good time, merely certifies that the particular prisoner is legally *eligible* for parole consideration.

[14] It should be noted that the court has not relied on the indigence of the plaintiffs or their class members in holding § 230(3) to have created an unreasonable classification. The invidious discrimination here is not necesarily between the rich and the poor, but rather between the jailed and the non-jailed. Of course, in reality, the weight of pre-sentence incarceration falls most heavily on the indigent, but it is certainly not reserved for him alone.

[15] The rationale of this decision would appear to apply with equal force to "definite sentence" prisoners—that is, those prisoners sentenced to a "sentence to imprisonment in a state prison for a definite fixed period of time," § 230(1)—who are similarly denied good time credit for jail time by § 230(3). This issue, however, has not been raised in the instant litigation, and such prisoners have therefore been omitted from the class.

Opinion of the Three Judge District Court, filed August 23, 1971.

Hays, Circuit Judge, dissenting:

If a classification made by a state has some reasonable basis it does not violate the equal protection clause. *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

There seems to me to be a reasonable ground for distinguishing in the award of good time credit between time spent in state prison under the supervision of the state prison authorities and time spent in county jail under the supervision of local authorities. It was surely not wholly arbitrary for the legislature to provide that the Parole Board should have the power to act upon a prisoner's application only after the prisoner has spent a fixed proportion of his sentence in a place where his conduct has been under the observation of state prison officials rather than in a local jail.

Under the guise of applying constitutional principles federal judges are increasingly taking over from the states the administration of state prison systems. In this case, as in a number of others recently decided, the assumption of these new duties appears to be based rather on the judges' conviction that they can administer state prisons more wisely than can the state authorities, and not on any compelling constitutional considerations.

Order of United States District Court Entered October 15, 1971.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ORDER

70 Civ. 4365

JAMES ROYSTER, PERCY RUTHERFORD, and all other persons similarly situated,

Plaintiffs,

against

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants.

A complaint having come before the United States District Court, Southern District, brought under 42 U.S.C. §1983, with federal jurisdiction predicated on 28 U.S.C. §1343(3), an oral hearing had thereon, on March 3, 1971, before the Honorable Paul R. Hays, United States Circuit Judge, the Honorable Morris E. Lasker, District Judge, and the Honorable Charles M. Metzner, District Judge. After duly considering all of the evidence including the oral argument for plaintiffs and defendants and the memoranda of law submitted thereby, an opinion of the Honorable Morris E. Lasker, United States District Judge, for the Southern District of New York, having been filed on August 23, 1971, declaring (1) that the declaration of a class action, defined to include all prisoners who are presently serving indeterminate sentences in state prison for

offenses committed prior to September 1, 1967, who served time in county jail prior to trial and sentence to state prison, who have not yet reached their minimum release program under § 230-a of the Correction Law, is granted; (2) that § 230(3) of the New York Correction Law, insofar as it denies good time credit for jail time to indeterminate sentence prisoners in the computation of their minimum release dates is unconstitutional; and (3) that defendants Paul D. McGinnis, Commissioner of Correction, State of New York, Harry Fritz, Warden, Auburn Prison, Auburn, New York, and J. L. Casscles, Warden, Ossining Correctional Facility, Ossining, New York, be permanently enjoined and restrained from enforcing § 230(3) of the New York Correction Law so as to deny such credit to plaintiffs and members of their class. It is hereby

ORDERED AND ADJUDGED that § 230(3) of the New York Correction Law, insofar as it denies good time credit for jail time to indeterminate sentence prisoners in the computation of their minimum release dates, is hereby declared unconstitutional, and it is further

ORDERED AND ADJUDGED that the defendants, Paul D. McGinnis, Commissioner of Correction, State of New York, Harry Fritz, Warden, Auburn Prison, Auburn, New York, and J. L. Casscles, Warden, Ossining Correctional Facility, Ossining, New York are permanently enjoined and restrained from enforcing § 230(3) of the New York Correction Law so as to deny good time credit for jail time served in county jail prior to trial and sentence to state prison to indeterminate sentence prisoners in the computation of their minimum release date, and it is further

ORDERED AND ADJUDGED that the declaration of a class action is hereby granted, the class defined to include all

Order of United States District Court Entered October 15, 1971.

prisoners who are presently serving indeterminate sentences in state prison for offenses committed prior to September 1, 1967, who served time in county jail prior to trial and sentence to state prison, who have not yet reached their minimum release date, and who have not as yet elected the conditional release program under § 230-a of the Correction Law, and it is further

ORDERED AND ADJUDGED that the mandate of this Court be stayed pending the disposition of defendants' appeal to the United States Supreme Court *provided that* said relief be sought within 30 days of the order granting the stay or within such time as may be granted by the Supreme Court upon application to that Court for a further stay.

Dated: New York, New York
October 12, 1971

.....
U. S. D. J.

/s/ CHARLES M. METZNER
U. S. D. J.

/s/ MORRIS E. LASKER
U. S. D. J.

Although I dissent from the decision of the court in this case, I join in the order as correctly representing that decision.

October 13, 1971 /s/ PAUL R. HAYS
U.S.C.J.

Judgment entered 10/15/71

/s/ JOHN LIVINGSTON
Clerk

Notice of Appeal, Filed November 12, 1971.

UNITED STATES DISTRICT COURT,

Southern District of New York.

70 Civ. 4365

James Royster, Percy Rutherford and all other persons similarly situated,

Plaintiffs,

against

Paul D. McGinnis, Commissioner of Correction, State of New York, Harry Fritz, Warden, Auburn Prison, Auburn, New York, J. L. Casscles, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants.

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Paul D. McGinnis, Harry Fritz and J. L. Casscles, defendants in this action, hereby appeal to the Supreme Court of the United States from the final order granting a declaratory judgment and a permanent injunction, entered in this action on October 14, 1971.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Defendants
Office & P. O. Address
80 Centre Street
New York, New York 10013

By

/s/
Michael Colodner
Assistant Attorney General

Order of United States District Court, dated November 12, 1971.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 CIV. 4365

ORDER

JAMES ROYSTER, PERCY RUTHERFORD, and all other persons similarly situated,

Plaintiffs,

against

PAUL D. MCGINNIS, Commissioner of Correction, State of New York, HARRY FRITZ, Warden, Auburn Prison, Auburn, New York, J. L. CASSCLES, Warden, Ossining Correctional Facility, Ossining, New York,

Defendants.

A complaint having come before the United States District Court, Southern District, brought under 42 U.S.C. § 1983 challenging the constitutionality of section 230(3) of the New York Correction Law, and after briefs filed and arguments presented an order having been signed and dated October 14, 1971 declaring said section unconstitutional and permanently enjoining its enforcement, and said order further containing a stay of the mandate of the Court pending the disposition of defendants' appeal to the United States Supreme Court provided that said relief be sought within 30 days of the order granting the stay, and said 30 days being about to expire on November 13, 1971, it is hereby

Order of United States District Court, dated November 12, 1971.

ORDERED AND ADJUDGED that the mandate of this Court be stayed pending the disposition of defendants' appeal to the United States Supreme Court *provided that* said relief be sought by November 26, 1971 or within such time as may be granted by the Supreme Court upon application to that Court for a further stay.

Dated: New York, New York, November 12, 1971

/s/ MORRIS E. LASKER
U.S.D.J.

/s/ CHARLES M. METZNER
U.S.D.J.

/s/ PAUL R. HAYS
U.S.C.J.

Supreme Court of the United States

No. 71-718

Paul D. McGinnis, Commissioner of Correction, State of New York, et al.,

Appellants,

v.

James Royster, et al.

APPEAL from the United States District Court for the Southern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

March 20, 1972